

<i>Housing allowance</i>	
(a) Pre-trial loss	\$ 848/-
(b) Post trial loss	\$3,250/-
<i>Bonus</i>	
(a) Pre-trial loss	\$ 160/-
(b) Post trial loss	\$ 557/-
<i>Dividends on Tabung Angkatan Tentera</i>	
(a) Pre-trial loss	\$ 708/-
(b) Post trial loss	\$ 950/-
<i>Gratuity</i>	
\$2,016/- - \$672/-	\$1,344/-
<i>Pensions</i>	
\$80/- per month for 9 years (using the Annuity Table)	\$6,825/-
Total	\$27,022/-
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When he retires in 1990 the plaintiff will be 42 years old. In his own evidence the plaintiff said he planned on retirement to embark on "a small business" in Kelantan (page 34). In our view a more reasonable assessment of his future loss of earnings will be \$150/- p.m. x 9 years purchase which will produce a round figure of \$12,800/-.

We will therefore allow the appeal accordingly on both items of the award. The respondent shall pay half of the costs of the appeal. Deposit shall be refunded to the appellant.

Appeal allowed.

Solicitors: *Matthew Thomas & Co.; R.K. Nathan & Co.*

GISELA GERTRUD ABE v. TAN WEE KIAT

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.)
December 4, 1985 & May 10, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 179
of 1985]

Family Law – Maintenance – Change of circumstances – Suspension of maintenance order – Law Reform (Marriage and Divorce) Act, 1976, ss. 83 & 96.

This was an appeal from the decision of Siti Norma Yaakob J. reported at [1986] 2 M.L.J. 58. The learned judge had directed that the maintenance order dated May 4, 1979 for the period from June 6, 1983 to January 5, 1984 be rescinded. The learned judge further directed that

A the amount of maintenance be reduced in the manner following –

(a) from \$1,500 to \$800 per month from January 6, 1984 to May 31, 1985 and

(b) from \$800 to \$400 from June 1, 1985 onwards until further order.

B The appellant appealed to the Supreme Court.

Held: (1) there are no good reasons to interfere with the discretion of the learned judge regarding the part of the maintenance order for the period June 6, 1983 to January 5, 1985 when the respondent was unemployed after having been retrenched by his employer. However, the learned judge had no power to discharge the order for a limited period of time;

(2) the word "to vary" in sections 83 and 96 of the Law Reform (Marriage and Divorce) Act 1976 should be given a wide meaning and should not be confined only to increase or reduce the amount of the periodical payments of maintenance for the wife and/or the children of the marriage but also to include power to suspend the maintenance order or any provisions thereof temporarily and to revive the operation of the maintenance order or any provisions so suspended;

(3) in this case the learned judge had power to suspend the operation of the order of maintenance and her order should be confirmed with the substitution of "suspend" for the word "rescind" therein;

(4) the learned judge exercised her discretion correctly in varying the order of maintenance when the children attained their respective majorities but she should have adopted the same amount of variation in each case. In the circumstances of this case a reduction of \$300 per month would be a fair and reasonable sum and therefore the figures of \$900 for \$800 per month should be substituted from January 6, 1984 to May 31, 1985 and \$600 for \$400 each month from June 1, 1985 onwards.

Cases referred to :

- G (1) *Bellenden v. Satherwaite* [1940] 1 All E.R. 343.
(2) *Cockburn v. Cockburn* [1957] 3 All E.R. 260.
(3) *Kershaw v. Kershaw* [1964] 3 All E.R. 635.

SUPREME COURT.

S. Sivasubramaniam for the appellant.

Kingston T.K. Tan for the respondent.

Cur. Adv. Vult.

I **Seah S.C.J.** (delivering the Judgment of the Court): This is an appeal by the wife (hereinafter referred to as the appellant) against an Order of Siti Norma Yaakob J. directing that the maintenance order dated May 4, 1979 for the period from June 6, 1983 to January 5, 1984 be rescinded. The learned judge further directed that the amount

of the maintenance be reduced in the manner following:

- (a) From \$1,500.00 to \$800.00 per month from January 6, 1984 to May 31, 1985 and
- (b) From \$800.00 to \$400.00 per month from June 1, 1985 onwards until further order.

The appellant was dissatisfied with these decisions and has appealed to the Supreme Court.

The first point taken by learned counsel for the appellant was that the court had no power to rescind an order for maintenance from June 6, 1983 to January 5, 1984 or for any other period of time. This contention was disputed by learned counsel for the husband (hereinafter referred to as the respondent). In our opinion, the answer to this submission depends upon the true construction to be given to sections 83 and 96 of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the Act). It is common ground that these sections give to the court a general power to vary or rescind any subsisting periodical payments for the wife (section 83) and/or the children (section 96) of the marriage where it is satisfied that it was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Now to "rescind" means to abrogate, annul, revoke, cancel, discharge or to put an end to altogether. It follows that when a maintenance order is rescinded by a court order it ceases to exist henceforth. Adopting this interpretation, we are constrained to hold that the general power contained in sections 83 and 96 of the Act does not empower the court to make an order discharging the maintenance order for a limited period of time. That, however, is not the end of the matter. It seems to us that the learned judge did not intend to abrogate the maintenance order altogether as it was clear from the latter part of the Court Order that it was to take effect at a reduced rate of \$800.00 per month from January 6, 1984 to May 31, 1985 and thereafter at \$400.00 each month from June 1, 1985 onwards. It appears to us that the learned judge had intended the maintenance order to be suspended during the period when the respondent was unemployed after having been retrenched by his employer from June 6, 1983 to January 5, 1984. The question we have to determine was whether or not the court had the power to do so under sections 83 and 96 of the Act? In our opinion, the word to "vary" should be given a

A wide meaning and should not be confined only to increase or reduce the amount of the periodical payments of maintenance for the wife and/or the children of the marriage but also to include power to "suspend" the maintenance order or any provisions therein temporarily and to revive the operation of the maintenance order or any provisions so suspended. Applying this to the facts herein we rule that the learned judge had the power under the provisions of sections 83 and 96 of the Act to make an order suspending the operation of the order of maintenance during the period from June 6, 1983 to January 5, 1984 respectively. In making such an order the learned judge appeared to have taken the undermentioned factors into consideration:

- D (a) That the respondent was unemployed during this 7-month period when he was retrenched by his company;
- E (b) That he had to borrow money from his mother to discharge a bank loan he obtained from United Asian Bank on the security of a house at Ukay Heights, Kuala Lumpur which is registered in the name of the appellant during this period of unemployment;
- (c) That he was forced to ask for further loans from his mother and sister –
- F (i) to pay the taxed costs of the divorce proceedings amounting to \$8,414.62,
- (ii) to pay his own legal fees of \$10,415.27,
- (iii) to settle a judgment-debt of \$2,469.67 in favour of the appellant and
- G (iv) to deposit with the appellant's solicitor a sum of \$10,500.00 representing 7-month arrears of maintenance pending the result of his application to the court.

H It was not disputed that the respondent had deposited with Malayan Banking Bhd. some warrants from Consolidated Plantations Bhd. as security for an overdraft. The learned judge was satisfied that the bank had converted them into shares and had the shares sold and utilized part of the proceeds of sale to offset the overdraft account and returned the balance of approximately \$30,000.00 to the respondent. The learned judge found as a fact that the respondent used this \$30,000.00 towards partial repayment of the large debt which he owed to his mother. We see no good reasons to differ from the learned judge in the exercise of her discretion regarding this part of the

maintenance order during this 7-month period except to substitute "suspend" for the word "rescind" thereof.

It was then argued by learned counsel for the appellant that the effect of back-dating the Court Order from June 6, 1983, to January 5, 1984 would tantamount to ordering a refund of the periodical payments back to the respondent. A perusal of the notes of proceedings would appear to indicate that the respondent did not actually pay the sum of \$10,500.00 but that the amount was merely deposited with the appellant's solicitor pending the outcome of his application to the court. Since we have already held that the learned judge only intended to suspend the maintenance order for a period of seven months, there is no need to express any opinion on this submission except to state that it seems to be misconceived.

Next, it was submitted by learned counsel for the appellant that the learned judge erred in varying the amount of the maintenance order —

- (a) from \$1,500.00 to \$800.00 per month from January 6, 1984 to May 31, 1985 and
- (b) from \$800.00 to \$400.00 per month from June 1, 1985 onwards.

Before dealing with his submission we would like to set out briefly the material changes of circumstances relied on by the respondent for these variations.

First, when the marriage was dissolved in 1979 by an Order of the High Court the respondent was ordered to pay periodical payments for the maintenance of the appellant and 2 daughters of the marriage in the sum of \$1,500.00 each month. At that time, the respondent was working for Conzinc Tiotinto Malaysia Sdn. Bhd. at a monthly salary of \$5,000.00 and the 2 daughters, Tan Kay-ti and Tan Su-lin were 16 and 11 years old respectively having been born on December 8, 1962 and May 31, 1967. They were apparently living with their mother in Kuala Lumpur. However, the respondent was retrenched in mid-1983 and was unemployed from June 6, 1983 to January 5, 1984. On January 6, 1984 he found employment with Malayan United Management Sdn. Bhd. at a reduced salary of \$3,000.00 per month and after deducting Employees Provident Fund contribution his nett take-home pay was \$2,730.00. Secondly, in 1979 the respondent remarried and the second wife brought along 3 children from her

A previous marriage to live with them. No attempt was made to establish whether the former husband of the second wife has been ordered by the court to pay maintenance for the upkeep of these 3 children of the marriage. Nor was there any evidence to show that the respondent has accepted the 3 children of the second wife as members of his family. In our opinion, these are relevant factors having regard to the provision of section 99(1) of the Act. Thirdly, following his remarriage, the respondent and the second wife jointly purchased a house at No. 8, Jalan Aman, Kuala Lumpur for the sum of \$380,000.00 with a bank loan of \$200,000.00 and a monthly repayment of \$2,761.00. Fourthly, the 2 daughters of the marriage had now reached their eighteen birthdays, Tan Kay-ti on December 8, 1980 and Tan Su-lin on May 31, 1985. Lastly, the appellant has been operating her own business under the style of Tanabe Holdings Sdn. Bhd. since 1982 albeit the balance sheets for the years 1982, 1983 and 1984 showed losses of \$2,983.13, \$10,320.53 and \$15,260.24.

E In controversial matters as to the amount of maintenance to be ordered or reduced in an application to vary a subsisting order for maintenance due to material changes of circumstances, there is room for differences of opinions as to what should be the fair sum, what is just and what is reasonable in the circumstances. However, in deciding an application to vary an existing maintenance order, in our opinion, a court should always be guided by certain basic considerations. The first and foremost is that on a dissolution of the marriage, both the husband and the wife are legally entitled to remarry and to start a new family. When a husband does so he will assume new financial burdens and responsibilities in that he now has a legal obligation to support the second wife and he may undertake a moral obligation to look after any children of the second wife. Since there are now two households to be maintained in place of the former one the resources of the husband have also to be shared [see *Bellenden v. Satherthwaite*⁽¹⁾; *Cockburn v. Cockburn*⁽²⁾ per Hodson L.J. and *Kershaw v. Kershaw*⁽³⁾ per Sir Jocelyn Simon P.]. *Pro tanto* the means of the husband will "decrease" and that of the wife may "increase". On the other hand, if the wife remarries, her right to periodical payments in the form of maintenance shall cease [see section 82(1) of the Act] as the wife will secure a new legal right to be supported. In the second place, an order for maintenance of a normal

child of the marriage shall expire on the child attaining the age of eighteen years [see section 95 of the Act].

When the elder daughter, Tan Kay-ti reached her eighteen birthday on December 8, 1980 and therefore ceased to be entitled to support from her father, it appeared that the respondent continued to pay the sum of \$1,500.00 each month to the appellant without protest until he was retrenched by his company in mid-1983. Until the maintenance order was varied by the court the respondent was bound to pay it and the appellant was entitled to receive it. The second daughter, Tan Su-lin attained the age of eighteen years on May 31, 1985. Having regard to these uncontroverted facts the learned judge was right to vary the amount of the maintenance in view of the implicit provision of section 95 of the Act.

Learned counsel for the appellant did not seek to challenge the power of the court to make these variations; his only complaint appeared to be one of quantum. In our opinion, when an application is made to the court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date including any changes which the court is required to have regard to under section 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.

We were reminded by learned counsel for the appellant that when the court ordered the respondent to pay maintenance in the sum of \$1,500.00 per month in 1979 both the daughters of the marriage were apparently living with their mother in Kuala Lumpur. It was argued that this figure did not appear to take into account the future prospects that either one or both the daughters would be proceeding to the United Kingdom for higher studies. The fact that both are now studying abroad should not be a material factor to be considered by the learned judge when the same was disregarded in 1979. If this were not to be taken into consideration, it was contended that the estimated costs for board and lodging, pocket-money, tuition fee when the daughters were studying in Kuala Lumpur and other expenses of a personal nature would be in the region of \$300.00 each month. Using our local knowledge of living conditions in Kuala Lumpur, we think

A this seems a reasonable sum and we would therefore accept it for the purpose of this appeal.

B It was pointed out (correctly in our opinion) by learned counsel for the appellant that the learned judge was inconsistent in varying the order of maintenance in that when the elder daughter, Kay-ti was no longer legally entitled to claim support from the respondent, the variation was from \$1,500.00 to \$800.00 per month from June 6, 1983 to January 5, 1984. This represents a substantial monthly reduction of \$700.00. Whereas C when the second daughter, Su-lin reached her eighteen birthday on May 31, 1985 the reduction was \$400.00 each month. We recognized the force of this submission. In our opinion, unless there is evidence to the contrary, for example, when the child is under a physical and/or mental disability, D the same amount of the variation should be adopted by the court. To do otherwise may result in uncertainty in the laws. It follows that the learned judge erred when she allowed a reduction of \$700.00 per month in respect of Kay-ti and only \$400.00 each month for Su-lin. In our judgment, E the learned judge ought to adopt the same amount for each daughter and she misdirected herself when she failed to do so. Bearing in mind that material changes in the circumstances of the respondent had taken place since 1975 which have already been enumerated and which we need not recapitulate here, we are satisfied that the respondent had F made out a *prima facie* case for a variation of the maintenance due and payable to the appellant alone to take effect from January 6, 1984. Ignoring the 7-month period from June 6, 1983 to January 5, 1984 which had already been provided for, taking a realistic view and giving our best G attention to the matter, we consider a reduction of \$300.00 per month would be a fair and reasonable sum in the circumstances. We therefore substitute the figures of \$900.00 for \$800.00 per month from January 6, 1984 to May 31, 1985 and \$600.00 for \$400.00 each month from June 1, 1984 onwards. H For the above reasons we allow the appeal with costs here only to be taxed. The deposit to be refunded to the appellant.

Appeal allowed.

I Solicitors: Siva, Ram & Associates; Kadir, Tan & Ramli.